Midwest Power Systems, Inc. ***and*** **International Brotherhood of Electrical Workers, Local Union 499.** Case 18–CA–12545

August 27, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On April 4, 1997, the National Labor Relations Board issued its Decision and Order in this proceeding,[1] finding that the Respondent violated Section 8(a)(5) and (1) of the Act by announcing and implementing changes to the future retirement medical and life insurance benefits of current bargaining unit employees without giving the Union notice and an opportunity to bargain about these changes and their effects.

On April 22, 1997, the Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia Circuit and the Board filed a cross-application for enforcement on June 12, 1997.

On February 18, 1998, the court issued its decision granting the Respondent's petition for review, denying enforcement of the Board's Order and remanding the case to the Board for further proceedings in accordance with the court's opinion.[2] The court remanded the matter for the Board to determine whether the collective-bargaining agreements incorporated the retiree plan documents.

On October 27, 1998, the Board informed the parties that it had accepted the remand and invited the parties to submit statements of position with respect to the issue on remand. Thereafter, the Respondent, the General Counsel and the Charging Party each filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the court's remand and the parties' statements of position, and finds, as explained below, that the retiree plan documents were not incorporated into the collective-bargaining agreements.[3]

The relevant facts are set forth fully in the prior decision. Briefly, they are as follows. In late 1991, the Respondent announced that it intended to raise the costs of health insurance for retirees and notified active employees of the changes which would be applicable to those active employees who retired after a specified future date. The Respondent informed the Union that it would listen to the Union's concerns with the caveat that it considered the issue a nonmandatory subject of bargaining. Thereafter, the Respondent implemented the changes, albeit as modified over the course of the parties' discussions.

The Board found that the Union had not waived its right to bargain over the future retirement benefits of active employees by agreeing to clauses in the retiree benefit plans, which reserved to Respondent the right to change or eliminate the benefit plan at any time. The Board assumed arguendo that the collective-bargaining agreements at issue incorporated the retiree plan documents, including the reservation clauses. The Board concluded, however, that the reservation clauses reserved only the Respondent's right to change or terminate benefits of retirees and did not give the Respondent the right unilaterally to change the future retirement benefits of active employees.

The court remanded the case to the Board solely for a determination of whether the collective-bargaining agreements actually incorporate the retiree plan documents. The court noted that, contrary to the Board's assumption, counsel for the Respondent appeared to concede at oral argument that the so-called incorporation clauses did not incorporate the retiree plan documents, and that references in the incorporation clauses to 'employee insurance plans' pertained solely to the separate set of insurance policies applicable to active employees.[4]

We find, in agreement with the Respondent's apparent concession to the court, that the facts do not establish that the retiree plan documents were incorporated into the collective-bargaining agreements. The relevant contract clauses refer specifically to the provision of employee insurance plans by separate agreement and make no reference to retirement benefit or pension plans.[5] In

[1] 323 NLRB 404 (1997).

[2] The court issued an unpublished memorandum decision, 159 F.3d 636 (1998).

[3] Contrary to our dissenting colleague, we would not remand this case for a hearing. The parties originally stipulated that there was no need for a hearing in this case. In the statements of position to the Board following the remand, no party argues that a hearing is necessary to resolve the issue of whether the relevant plans were incorporated into the collective-bargaining agreement. The fact that the parties have differing views on the issue before us does not require a hearing where the stipulation of facts and exhibits are sufficient to resolve the issue raised by the remand.

[4] In its statement of position the Respondent does not dispute its apparent concession to the court, but argues that the plans were incorporated into the agreements.

[5] The Southern Agreement and its successor agreement, provide in relevant part that:

> By separate understandings, the parties have provided for certain employee insurance plans. These plans provide for hospital, dental, surgical and medical insurance, group life insurance, and

the Southern, Gas and Clerical agreements, the relevant contract clause states that separate understandings between the parties provide "certain employee insurance plans" and that these plans include health, life and disability insurance plans. These contract provisions do not mention retiree plans. Thus the plain language of the Southern, Gas and Clerical collective-bargaining agreements incorporates, if at all, solely the insurance plans of current active employees.[6] In contrast, in *Amoco Chemical Co.,* 328 NLRB 1220 (1999), enf. denied sub nom. *BP Amoco Corp. v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000), the relevant provision in the collective-bargaining agreement stated that "the following Employee Benefit Plans are generally set forth in the current Benefits Plan Booklets," and listed eight named plans including a savings, group life insurance, retirement, dental, and health benefit plan at issue in the case, the terms of which applied to both current and retired employees. In contrast, the Respondent's various plans covering active employees are separate from those covering retired employees.[7]

Nor do we view the Northern Agreement's provision referring simply to "negotiated fringe benefits" as warranting a different result.[8] This provision mentions no benefit plans or programs, nor does it specifically refer to retiree benefits of any sort. Without any description of the nature and form of the fringe benefits, referred to in the agreement, there is insufficient basis to conclude that the retirement benefit plans are included.

We therefore find that the retiree plan documents were not incorporated into the collective-bargaining agreements. Since the retiree plan documents are not incorporated, the reservation of rights provision on which the Respondent relies to justify its actions is also not incorporated into the contracts. Accordingly, for the reasons offered here and in the Board's original decision, we reaffirm our previous finding that the Union did not waive its right to bargain over changes in the retiree plan, and that the Respondent violated Section 8(a)(5) of the Act by making unilateral changes in the retirement health insurance benefits of the current employees.

ORDER

The National Labor Relations Board reaffirms its original Order, reported at 323 NLRB 404 (1997), and orders that the Respondent, Midwest Power Systems, Inc., Des Moines, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

CHAIRMAN HURTGEN, dissenting.

The District of Columbia Court of Appeals remanded this case to the Board to resolve the issue of whether retiree benefit plan documents are incorporated by reference in the parties' collective-bargaining agreements. My colleagues conclude that they are not. They rely on the absence of the phrase "retiree plans," and on the presence of the word "employee," in the contractual provisions that specify that certain benefit plans, not appended to the contracts, are incorporated by reference into those agreements.[1] In my colleagues' view, it fol-

long-term disability insurance. The [Respondent] agrees to continue these plans for the term of this Wage Working Contract.

The Gas Agreement, and its successor agreement, provide in pertinent part that:

> By separate understandings, the parties have provided certain employee insurance programs. Their plans are embodied in separate agreements and include a Comprehensive Medical Insurance Plan, Dental Plan, Vision Plan, Long-Term Disability Plan, and Group Life Insurance Plan. The [Respondent] agrees to continue them in accordance with separate understandings. It will be the [Respondent's] responsibility to determine which carriers administer these benefit programs.

The Clerical Agreement provides in relevant part:

> By separate understanding, the parties have provided for certain employee insurance plans. These plans provide for hospital, surgical and medical insurance, group dental insurance, group life insurance and long-term disability insurance.

The Northern Agreement provides, in relevant part, that "the Union has negotiated fringe benefits which are not contained in this Agreement for Union personnel."

[6] Accordingly, we find *Mary Thompson Hospital,* 296 NLRB 1245 (1989) distinguishable. At issue in that case, was the unilateral discontinuance of a contractually mandated pension plan. However, the plain language of the collective-bargaining agreement specifically incorporated the entire pension benefit plan document, including a clause reserving the respondent's right to terminate the pension plan at any time.

[7] Contrary to the contention of the dissent, we do not view the Union's position on remand to be "equivocal on the issue of incorporation." The Union only argues that the retirement benefits are "incorporated" to the extent that there is a requirement that all existing benefits, contractual or noncontractual, be maintained during the term of the contract, absent a mutually agreed-upon change.

Nor do we find that the Union's attempt to bring the issue under the grievance procedure supports a conclusion that the contract incorporated the plan documents. Indeed, the Respondent denied the grievance, asserting that "it was not obligated by contract or Federal law to negotiate retiree medical benefits and, even if it were, that matter was not subject to the grievance or arbitration provisions of the contract." The Respondent also informed the Union that it had "reserved the right to change or terminate retiree medical benefits at any time."

[8] See fn. 4, supra.

[1] These provisions are as follows:

A. Southern Agreement

Art. 1, Sec. 2

> It is agreed by the Company and the Union that all matters subject to negotiations and collective bargaining, including but not limited to wages, hours, schedules, working conditions, job content, safety rules, and other terms of employment are in effect at the time of signing of the new Contract shall remain in force and effect as they exist or as they are covered in the Contract, during the term of the Contract except as provided in Section 3 of this Article.

Art. XIV, Sec. 1.1

> By separate understandings the parties have provided for certain employee insurance plans. These plans provide for

lows from the above that the retiree plan documents are not incorporated into the agreements. Contrary to my colleagues, I do not find that these factors are wholly dispositive of the issue. Further, I note that this case was presented to the Board on a stipulated record, without a hearing before an administrative law judge. Nowhere in the stipulation do the parties address, let alone resolve, the issue of whether retiree benefit plan documents are incorporated by reference into the collective-bargaining agreements.

To the extent that the stipulation is suggestive of the result, the stipulation arguably supports a claim of incorporation. Thus, the stipulation states that, in 1992, the Union filed a grievance over the Respondent's proposed changes to retiree medical benefits applicable to the Southern and Gas bargaining units. Similarly, after the Respondent informed the Union in 1994 of prospective changes to retiree medical insurance for individuals covered by the Northern contract, the Union filed a grievance. Such grievances suggest that even the Union considered the retiree benefit plan to be incorporated into the collective-bargaining agreements.[2]

I also note that the issue of incorporation is not resolved by the positions of the parties on remand. Thus, we have the Respondent's contention, on remand, that the retiree plan documents *are* incorporated, and that the parties have never previously contended otherwise. Next, we have the position of the Union, on remand, which is equivocal on the issue of incorporation. The Union argues that, based on the provisions of the collective-bargaining agreements set forth above (see fn. 1), "retiree benefits, as well as other benefits, as they existed and were in effect for active employees at the times of the execution of the agreements, could not be unilaterally changed by the Respondent . . . To the extent this basic agreement involves "incorporation" of the plan documents into the contract, if at all, they could be viewed as incorporated."

My colleagues suggest that the Union's position has a noncontractual base. I disagree. But, even if that were so, the Union's position is, at least in part, based on the contract. In addition, as noted above, the Union filed contractual grievances.

Further, I note that the General Counsel, on remand, does not even make the argument that my colleagues find persuasive. Rather, the General Counsel argues that the retiree plan documents are not incorporated in the agreements because the parties never *negotiated* the plan.[3]

My colleagues say that the Respondent appeared to concede at oral argument before the D.C. Circuit that retiree plan documents are not incorporated into the collective-bargaining agreements. In its brief on remand to the Board, the Respondent previously argues otherwise. Further, as noted above, the Union has not been consistent on the issue of incorporation. In these circumstances, the case cries out for a hearing on the facts.

My colleagues argue that there is no need for a hearing because (1) the parties originally stipulated the case to the Board; (2) neither party now seeks a hearing. As to point (1), the case has taken a significant turn, i.e., the court has remanded for findings of fact. The Board must

hospital, dental, surgical and medical insurance, group life insurance, and long-term disability insurance. The Company agrees to continue these plans for the term of this Wage Working Contract.

B. Gas Agreement
Art. I, Sec. 2
It is agreed by the Company and the Union that all matters subject to negotiations and collective bargaining, including but not limited to wages, hours, schedules, working conditions, job content, safety rules, and other terms of employment which are in effect at the time of signing of the new Agreement, and likewise, all of those covered by the Agreement shall remain in force and effect as they exist or as they are covered in the Agreement, during the term of the Agreement except as provided in Section 3 of this Article.
Art. XIV, Sec. 1.1
By separate understanding, the parties have provided certain employee insurance programs. Their plans are embodied in separate agreements and include a Comprehensive Medical Insurance Plan, Dental Plan, Vision Plan, Long-Term Disability Plan, and Group Life Insurance Plan. The Company agrees to continue them in accordance with separate understandings. It will be the Company's responsibility to determine which carriers administer these benefit programs.

C. Clerical Agreement
Art. XII
By separate understanding, the parties have provided for certain employee insurance plans. These plans provide for hospital, surgical and medical insurance, group dental insurance, group life insurance and long-term disability insurance.

D. Northern
Scope of Agreement, Sec. 6
All rules, schedules, and benefits heretofore existing and affecting regular employees which are not definitely referred to as changed by this Agreement with the Local Union shall remain unchanged unless changed by mutual agreement.
Art. 6, Sec. 4
The Union has negotiated fringe benefits which are not contained in this Agreement for Union personnel.

[2] As noted infra, the Union's statement of position seeks to permit the Union to have its cake and eat it too. The Union appears to say that the retirement *benefits* are incorporated into the contracts (hence the grievances) and to also say that the Respondent's *privileges* to make changes are not incorporated.

[3] As to this issue, I conclude that the absence of bargaining as to incorporation is a relevant factor, but not a dispositive one.

respond to the court and, as discussed supra, the stipulation does not dispose of the factual issues. As to point (2), it is not uncommon to have cases where both parties seek to avoid a hearing (cross-motions for summary judgment) and for the Board to nonetheless decide that a hearing is necessary (deny both cross motions). Similarly, in the instant case, the Board needs to hear the facts so as to respond to the court.

Accordingly, because I find that the language in the collective-bargaining agreements, the stipulations of the parties, and the parties' arguments on remand do not resolve the issue raised by the court, I would remand this case for a hearing before an administrative law judge. I would direct the administrative law judge to take evidence, make findings of fact, conclusions of law, and recommendations as to whether the retiree plan documents were incorporated in the collective-bargaining agreements.